or the ordinary death penalty.[14] But whipping, and lengthy imprisonment or death for a minor offense are questionable.[15] In determining whether a punishment is cruel and unusual, courts have considered not only the kind and degree of punishment and the magnitude of the crime,[16] but the special conditions in a particular locality,[17] and even the customs and beliefs of a particular class of individuals; so a regulation that the hair of every prisoner should be cut to a uniform length of one inch would be a cruel and unusual punishment if enforced against a Chinaman with a queue.[18] "Unusual" must be construed with "cruel" even when the provision is disjunctive,[19] and a new and humane method of inflicting the old punishment of death, as electrocution, is not prohibited.[20] Nor is a punishment unusual because never before inflicted for a certain crime, as the death penalty for attempt to rob a train.[21]

THE EFFECT OF THE PAROL EVIDENCE RULE ON DEFENSES TO NEGOTIABLE INSTRUMENTS. — The injustice which is so often reached by refusing strictly to admit any contradiction to or variation of the terms of a negotiable instrument has frequently led the courts to create exceptions to the parol evidence rule. But they have by no means agreed on what exceptions shall be allowed, and on this question the Negotiable Instruments Law is silent. As one theory of admissibility, it has been suggested that evidence of a collateral agreement should be admitted if an action and recovery thereon would result in circuity of action.[1] The weakness of this theory is the assumption that the collateral agreement can be made the basis of an independent action.[2] Another suggestion is that though this evidence should be excluded if it concerns express terms of the instrument, an oral variation of implied terms should be admitted, if it had to be oral to preserve the instrument's negotiability.[3] But a term implied by law is a component part of the instrument, so that to vary it, varies the instrument as it stands.[4] A more logical rule is the one generally adopted for other instruments. That is, to allow the evidence to show that the instrument itself, apart from collateral

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[14] State *v.* Borgstrom, 69 Minn. 508; *In re* Kemmler, 7 N. Y. Supp. 145.

[15] See *In re* McDonald, 4 Wyo. 150, 161; State *v.* Driver, 78 N. C. 423. See Thomas *v.* Kinkead, 55 Ark. 502, 508.

[16] But a sentence of five years' imprisonment for receiving stolen property is not "cruel and unusual," though the thief could not be punished so heavily. People *v.* Smith, 94 Mich. 644.

[17] Matter of Bayard, 25 Hun (N. Y.) 546.

[18] Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552.

[19] Storti *v.* Commonwealth, 178 Mass. 549.

[20] *In re* Kemmler, *supra.*

[21] State *v.* Stubblefield, 157 Mo. 360.

[1] See 2 AMES, CASES ON BILLS AND NOTES, 802. The results in the following cases support this view. Patterson *v.* Todd, 18 Pa. St. 426; Barry *v.* Morse, 3 N. H. 132.

[2] All agreements prior to the execution of a written instrument are merged in it. Borggard *v.* Gale, 107 Ill. App. 128.

[3] See WIGMORE, EVIDENCE, §§ 2443–2445. The results in the following cases support this view. Castrique *v.* Buttigieg, 10 Moo. P. C. 94; Coughenour *v.* Suhre, 71 Pa. St. 462.

[4] Charles *v.* Denis, 42 Wis. 56; Union Co. *v.* Lockwood, 110 Ill. App. 387.

agreements, never was enforcible between the parties, for example because of lack of consideration, or to show that no contract in fact has as yet come into existence.[5] But no agreement affecting an existing contract should be admitted.[6]

An application of these rules to a few cases will serve to illustrate their merits. For instance, it is universally held that the accommodating party may show lack of consideration if sued by the accommodated party.[7] This case can be supported on all three theories. First, a recovery here on the collateral agreement that the defendant should not be held, would be the full amount of the instrument, and thus would cause circuity of action. Consideration is an implied term of the note, so, on the second theory, its existence may be denied. Finally, the facts show the accommodating party never became liable to this plaintiff. Again, the weight of authority refuses to admit parol evidence to prove a promise not to sue this defendant.[8] Clearly on the first theory the evidence would be admitted. The second theory considers liability to an action an implied condition, and would allow evidence provided the agreement was omitted to preserve the instrument's negotiability. As a contract was created by the defendant's making the note or indorsing it to the plaintiff, no agreement contrary to the instrument is admissible on the third theory. Lastly, the weight of authority admits parol evidence of a condition precedent to delivery, but not of any other condition.[9] The first theory would admit not only these conditions, but conditions subsequent, if they avoid the whole instrument.[10] An exponent of the second view regards the absence of express conditions as an express statement that there are no conditions, and hence would exclude the evidence.[11] The third rule admits the evidence only if it shows there never was a contract between the parties, and thus accords with the weight of authority.[12]

In a recent Pennsylvania case, *Lockyer & Rhawn* v. *Poth*, 67 Legal Intell. 219 (Pa. C. P., Phila. County, March 17, 1910), evidence of an agreement to allow a renewal at maturity at the defendant's option, was admitted. By all these theories and by the weight of authority, this evidence is inadmissible.[13] A recovery would not be the amount of the note; the date of maturity is expressed; and finally, there was a good contract from the beginning.

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[5] Beard *v.* Boylan, 59 Conn. 181.
[6] Pratt Co. *v.* American Co., 50 N. Y. App. Div. 369.
[7] Thompson *v.* Clubley, 1 M. & W. 212; Cohen *v.* Goux, 48 Cal. 97.
[8] Davis *v.* Randall, 115 Mass. 547; Fairfield *v.* Hancock, 34 Me. 93. *Contra*, Dale *v.* Gear, 39 Conn. 89.
[9] Trumbull *v.* O'Hara, 71 Conn. 172; Westman *v.* Krumweide, 30 Minn. 313. *Contra*, Massmann *v.* Holscher, 49 Mo. 87.
[10] Bissenger *v.* Guiteman, 6 Heisk. (Tenn.) 277.
[11] See WIGMORE, EVIDENCE, § 2444.
[12] Ricketts *v.* Pendleton, 14 Md. 320.
[13] Wolk *v.* Rosenbach, 2 Pa. Sup. Ct. 587.